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Notice of Intended Regulatory Action (NOIRA) Agency Background Document

Agency name	Alcoholic Beverage Control Board
Virginia Administrative Code (VAC) citation	3 VAC 5-10
Regulation title	Procedural Rules for the Conduct of Hearings before the Board and its Hearing Officers and the Adoption or Amendment of Regulations
Action title	Changes to Franchise Act Procedure and Public Participation Guidelines as a Result of Periodic Review
Document preparation date	July 16, 2004

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 21 (2002) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Purpose

Please describe the subject matter and intent of the planned regulatory action. Also include a brief explanation of the need for and the goals of the new or amended regulation.

This action is intended to revise the Alcoholic Beverage Control Board's procedural rules for hearings held by hearing officers and the Board, to eliminate obsolete references, streamline procedures in cases arising under the Wine and Beer Franchise Acts, incorporate by reference the Supreme Court's discovery rules in franchise cases, and modernize public participation guidelines for the adoption or amendment of regulations by providing for use of the features of the Virginia Regulatory Town Hall for giving notice to the public of regulatory actions. The action is the result of a recent periodic review of this regulation.

The goals of this regulation are:

1. To provide an efficient process for the adjudication of contested license applications, disciplinary cases, and disputes under the Wine and Beer Franchise Acts, while protecting the public health, safety, and welfare.
2. To provide a reasonable opportunity for public input in the formation, amendment, or repeal of agency regulations.

Legal basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly chapter number(s), if applicable, and (2) promulgating entity, i.e., agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.

Title 4.1 of the Code of Virginia gives the Alcoholic Beverage Control Board general authority to regulate the manufacture, distribution and sale of alcoholic beverages within the Commonwealth, including the authority to promulgate regulations which it deems necessary to carry out the provisions of Title 4.1, in accordance with the Administrative Process Act, and to hold hearings and make case decisions on license applications, violations of the Board's regulations by licensees, and disputes arising under the Wine and Beer Franchise Acts. The Code mandates that the Board promulgate regulations and hold hearings, but details of the procedural rules are left to the Board's discretion.

Substance

Please detail any changes that will be proposed. For new regulations, include a summary of the proposed regulatory action. Where provisions of an existing regulation are being amended, explain how the existing regulation will be changed. Include the specific reasons why the agency has determined that the proposed regulatory action is essential to protect the health, safety, or welfare of citizens. Delineate any potential issues that may need to be addressed as the regulation is developed.

The Alcoholic Beverage Control Board is recommending this regulation be amended in several minor respects. In addition to the amendments arising from the public comment received, staff review discovered several references to positions or divisions of the agency which no longer exist. Amendments will be proposed to correct these obsolete references. In addition, the Board recommends that 3 VAC 5-10-400 be rewritten to incorporate Part 4 of the Rules of the Virginia Supreme Court by reference. The current section, which takes up some 20 pages in the Administrative Code, is closely modeled after the Supreme Court discovery rules. Substitution of the reference will reduce the text of the regulations of the Board by almost 20 percent, while referring practitioners to a rule with which they are already familiar. A screening process for cases arising under the Wine and Beer Franchise Acts will be eliminated as an unnecessary delay. A provision which prohibits the chief hearing officer from presiding over any case in which a consent settlement offer was submitted is recommended for deletion as unnecessary. The Board will also proceed with amendments to its public participation guidelines to incorporate the use of new electronic technologies, such as posting actions and meetings on the Regulatory Town Hall, and the use of the Town Hall's mailing list capabilities to provide notice.

In 3 VAC 5-10-40, 3 VAC 5-10-60, and 3 VAC 5-10-130, the term "Administrative Hearings Section" would be replaced with "Hearings and Appeals Division".

In 3 VAC 5-10-50, "Division of Enforcement and Regulation" would be replaced with "Bureau of Law Enforcement Operations".

In 3 VAC 5-10-150, the last sentence in subsection A would be deleted.

In 3 VAC 5-10-230, "deputy department director for regulation" would be replaced with "Director, Bureau of Law Enforcement Operations", and "Division of Enforcement and Regulation" would be replaced with "Bureau of Law Enforcement Operations".

In 3 VAC 5-10-360, after the first sentence, the remainder of the section would be deleted.

In 3 VAC 5-10-400, the majority of the text would be replaced with language adopting the discovery rules of the Virginia Supreme Court by reference.

In 3 VAC 5-10-480, in the second sentence of subsection B, the language "but shall be initiated at least once each calendar year" would be deleted, and references to the use of internet technology, such as the Regulatory Town Hall to provide notice of regulatory actions.

Alternatives

Please describe all viable alternatives to the proposed regulatory action that have been or will be considered to meet the essential purpose of the action.

Other than the recommended amendments to the regulation, the Board did not identify any alternatives for achieving the purpose of the existing regulation. Procedural rules and public participation guidelines are necessary to the efficient exercise of the Board's regulatory functions. It will consider any additional alternatives which may arise during the public comment period following the publication of the Notice of Intended Regulatory Action.

Family impact

Assess the potential impact of the proposed regulatory action on the institution of the family and family stability.

It is not expected that this regulatory action will have any impact on the institution of the family.

Periodic review

If this NOIRA is not the result of a periodic review of the regulation, please delete this entire section. If this NOIRA is the result of a periodic review, please (1) summarize all comments received during the public comment period following the publication of the Notice of Periodic Review, and (2) indicate whether the regulation meets the criteria set out in Executive Order 21, e.g., is necessary for the protection of public health, safety, and welfare, and is clearly written and easily understandable.

Commenter	Comment	Agency response
Virginia Beer Wholesalers Association	<p>Repeal 3 VAC 5-10-360, since it invites delay in the disposition of complaints filed pursuant to the Wine and Beer Franchise Acts.</p> <p>Repeal the current mandatory annual rulemaking requirement. This requirement is not necessary since any person is free to petition the Board at any time for a rule change.</p>	<p>All language after the first sentence of the section will be considered for repeal.</p> <p>The Board concurs with this suggestion.</p>

Procedural rules and public participation guidelines are essential to the Board's duty to protect the health, safety and welfare of the citizens of the Commonwealth through the passage and enforcement of regulations governing the manufacture, distribution and sale of alcoholic beverages. The lack of public comment indicates a level of satisfaction with the current procedural scheme, and discussions with practitioners before the Board reveal that they believe

the procedural rules and public participation guidelines are clearly written and easily understandable. The current rules appear to be effectively allowing cases to proceed through the system in an orderly fashion.